INTERIOR BOARD OF INDIAN APPEALS

Pueblo of Santa Clara v. Acting Southwest Regional Director, Bureau of Indian Affairs

40 IBIA 251 (02/16/2005)

Related Board case:
36 IBIA 131

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

PUEBLO OF SANTA CLARA, Appellant,	:	Order Vacating Decision
v.	:	
	:	Docket No. IBIA 03-36-A
ACTING SOUTHWEST REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	:	February 16, 2005

This is an appeal from an October 16, 2002, decision of the Acting Southwest Regional Director, Bureau of Indian Affairs (Regional Director; BIA), finding that certain land claimed by the Pueblo of Santa Clara (Pueblo) is owned by Charlie and Geralda M. Chacon (Chacons). For the reasons discussed below, the Board vacates the Regional Director's decision.

The Chacons own property west of the Rio Grande River within the Santa Clara Pueblo Land Grant. They trace their title to Zacarias Rodriguez and Rosarita V. de Rodriguez, who received a patent on June 28, 1937, pursuant to proceedings to resolve private claims under the Pueblo Lands Act of 1924, 43 Stat. 636.

In June 1998, a wildfire destroyed several boundary fences along the west bank of the river. Preparatory to replacing the fences, the Northern Pueblos Agency, BIA (Agency), contracted with a private firm to resurvey the area. According to the Regional Director, the new survey reestablished the boundary points in accordance with a U.S. General Land Office (GLO) survey. 1/ Because of accretions to the west bank of the river, the new survey showed

1/ The Regional Director refers to GLO survey plats but does not state when they were prepared. No copies of the plats are included in the administrative record. However, the Pueblo has furnished the Board with a GLO survey plat which shows the property now owned by the Chacons. The plat is titled "Supplemental Plat Showing Private Claims in Section 34 [T. 2 N., R. 8 E., N.M.P.M.] within the Santa Clara Pueblo Grant." This plat was prepared in connection with the Pueblo Lands Act proceedings and was approved by the GLO on Feb. 1, 1935.

The powers and duties of the GLO were transferred to the Bureau of Land Management (BLM) in 1946. Reorganization Plan No. 3 of 1946, 60 Stat 1097, 1100.

the boundary as now located between 300 and 400 yards from the river bank, 2/ whereas the 1935 GLO survey plat had shown the property as bounded by the river or the river bank. 3/ The Agency replaced the fences in the area in accordance with the new survey.

On April 12, 2000, the Chacons wrote to BIA's Southwest Regional Office and the Governor of the Pueblo, claiming ownership of the accreted lands and requesting that the Pueblo remove the fence. 4/ They wrote further letters to BIA on July 20, 2000, and October 10, 2000. BIA did not respond. On February 4, 2001, the Chacons wrote to the Interior Board of Land Appeals, asking for a ruling on the ownership question. The Board of Land Appeals referred their letter to this Board which, on April 25, 2001, dismissed it without prejudice as a premature appeal. Chacon v. Southwest Regional Director, 36 IBIA 131 (2001).

On October 16, 2002, after consulting with the Acting Southwest Regional Solicitor and the Branch of Cadastral Survey of BLM's New Mexico State Office, the Regional Director issued a decision in which he concluded that the Chacons own the land between the newly constructed fence and the bank of the Rio Grande River and that they were therefore entitled to request removal of the fence. Regional Director's Decision at 7.

The Pueblo appealed the decision to the Board. In its pre-docketing notice, the Board requested that the parties address the Board's jurisdiction over the subject matter of this appeal in light of Board decisions holding that it lacked authority to determine title to land. 5/

2/ Although all parties assume that the new land was formed by accretion, nothing in the record shows that a finding of accretion, as opposed to avulsion, has been made in this case.

3/ The Pueblo contends that the field notes for the GLO survey show that the bank of the river, rather than the river itself, was intended to mark the boundary of the property now owned by the Chacons. This contention is the basis for one of the Pueblo's challenges to the Regional Director's decision on the merits. Given its disposition of this appeal, the Board does not reach this contention.

4/ The Chacons believed the new fence had been constructed by the Pueblo. However, the Regional Director's decision states at pages 1-2 that it was the Agency's Branch of Forestry which did so.

5/ The cases cited in the pre-docketing notice were: Horob v. Aberdeen Area Director, 34 IBIA 95 (1999); Estate of Walter Sydney Howard, 32 IBIA 51 (1998); Cherokee Nation v. Acting Muskogee Area Director, 29 IBIA 17 (1995); Tsosie v. Navajo Area Director, 20 IBIA 108 (1991); and Noyo River Indian Community v. Acting Sacramento Area Director, 19 IBIA 63 (1990).

Briefs have been filed by the Pueblo and the Chacons. The Pueblo argues that the Board has full jurisdiction over this appeal. The Chacons argue that the Board lacks authority to adjudicate title to the subject property and that this appeal should be referred to the Interior Board of Land Appeals. 6/

The Pueblo contends that this case differs from the Board cases cited in the pre-docketing notice in that, in the earlier cases, the title questions were ancillary to the administrative decisions under review whereas here they are central to the Regional Director's decision which, according to the Pueblo, has "the effect of determining title (or rather, the Pueblo's lack of title) to a sizeable parcel of land." Pueblo's Opening Brief at 15. The Pueblo further contends that the Board's jurisdiction, as described in 43 C.F.R. §§ 4.1(b)(2) and 4.330, extends to the review of this Regional Director's decision because the decision is an administrative action of a BIA official and the subject matter does not fall within any limitations on the Board's jurisdiction in 43 C.F.R. § 4.330 or 25 C.F.R. Chapter I.

The Pueblo argues that, if the Board concludes that it lacks jurisdiction over the subject matter of this appeal, "it should also determine that the Regional Director lacked the authority to make the determination embodied in the Decision Letter in the first instance" because, "[i]nasmuch as this Board's power is essentially coterminous with the administrative authority of officials of the BIA, the one finding should necessarily compel the other." Id.

While the Board's authority is not coterminous with BIA's administrative authority in all respects, the Pueblo correctly notes that, if BIA purports to take an action under 25 C.F.R. Chapter I, and the Board's authority to review that action has not been specifically limited, the Board has authority to review BIA's action.

The Board's authority to review a BIA action necessarily includes the authority to determine whether BIA had the authority to take the action it took. Here, there is a question as to whether the Regional Director had the authority to issue the October 16, 2002, decision which, as the Pueblo recognizes, purports to determine title to land.

As to the Regional Director's authority in this regard, the Pueblo argues:

> [The October 16, 2002, decision] was not an "adjudication" of title, although it does have the effect of determining title (or rather, the Pueblo's lack of title) to a sizeable parcel of land. It was, rather, an interpretation by the Regional Director

---

6/ The Chacons rely on Holly H. Baca, 97 IBLA 126 (1987), a Board of Land Appeals decision concerning possible accretions to land owned by the appellants. The Chacons fail to note that Baca was an appeal from a BLM decision rejecting a color-of-title application. At this point in the present proceedings, no BLM action has been taken. Thus, there is nothing to be appealed to the Board of Land Appeals and nothing for that Board to review.

> of a survey of Indian lands, a matter that * * * is well within the express powers and responsibilities conferred on the BIA by federal statutes and regulations.

Id. As to the source of that authority, the Pueblo argues:

> Necessarily, [BIA's] responsibilities [under 25 C.F.R. §§ 150.3 and 150.9] require [BIA] to interpret survey documents, and to determine where the boundaries of Indian lands are properly located on the ground. That authority, moreover, is expressly conferred on the Secretary under 25 U.S.C. § 176. *See Pueblo of Taos v. Andrus*, 475 F. Supp. 359, 366 (D.D.C. 1979); *Boundary Dispute Between Santa Ana Pueblo and San Felipe Pueblo*, M-37000 (December 5, 2000).

Id. at 12.

Of the authorities cited by the Pueblo, only 25 C.F.R. §§ 150.3 and 150.9 apply directly to BIA. 25 C.F.R. § 150.3 provides:

> The Land Titles and Records Offices within [BIA] are hereby designated as the offices of record for land records and title documents and are hereby charged with the Federal responsibility to record, provide custody, and maintain records that affect titles to Indian land, to examine titles, and to provide title status reports.

25 C.F.R. § 150.9 provides:

> The Land Titles and Records Offices shall prepare and maintain maps of all reservations and similar entities within their jurisdictions to assist [BIA] personnel in the execution of their title service responsibilities. Base maps shall be prepared from plats of official survey made by [GLO] and [BLM]. These base maps, showing prominent physical features and section, township and range lines, shall be used to prepare land status maps. The land status maps shall reflect the individual tracts, tract numbers, and current status of the tract. Other special maps, such as plats and townsite maps, may also be prepared and maintained to meet the needs of individual Land Titles and Records Offices, Agencies, and Indian tribes.

Neither of these regulatory provisions gives BIA any explicit authority to interpret survey documents or determine boundaries. The function described in 25 C.F.R. § 150.3 is a recording and custodial function. Nothing in that section remotely suggests that it authorizes BIA to interpret surveys or determine boundaries of Indian land. 25 C.F.R. § 150.9 authorizes BIA to prepare maps but requires that those maps be based on GLO and BLM surveys. While there is perhaps a possibility that a GLO or BLM survey would require interpretation prior to

preparation of a map, sec. 150.9 does not specifically authorize BIA to make that interpretation itself. In any event, in this case, the Regional Director was not interpreting a survey for the purpose of preparing a map. Accordingly, even if sec. 150.9 gives him interpretative authority in connection with the preparation of maps, nothing in that section suggests that it gives him authority to render decisions in title disputes.

The Pueblo acknowledges that the authority granted by 25 U.S.C. § 176 is vested in the Secretary of the Interior, rather than BIA. 25 U.S.C. § 176 provides:

> Whenever it becomes necessary to survey any Indian or other reservations, or any lands, the same shall be surveyed under the direction and control of [BLM], and as nearly as may be in conformity to the rules and regulations under which other public lands are surveyed.

The authority granted to BLM by this provision was transferred to the Secretary in 1950, 7/ and subsequently delegated back to BLM. See 757 DM (Departmental Manual) 2.3C ("[BLM] has the authority to survey all Federal interest lands, trust territories, and Indian lands"); 757 DM 2.7B(3) ("BLM is specifically required to execute cadastral surveys for [BIA] on Indian reservations").

The Pueblo's citations to the Federal district court decision in Pueblo of Taos v. Andrus, supra, and Solicitor's Opinion M-37000 add no further weight to its argument. While both recognize the authority of the Department of the Interior to survey Indian lands under 25 U.S.C. § 176, neither recognizes any authority in BIA to interpret surveys or render decisions in title disputes.

None of the authorities cited by the Pueblo support its contention that the Regional Director had the authority to issue the October 16, 2002, decision.

As noted above, the Regional Director's decision purports to determine title to land. In actual effect, however, it is not a "decision" at all because it does not describe any action to be taken by BIA but simply advises the Chacons that they are entitled to seek removal of the fence. In essence, it is a statement of the Regional Director's opinion concerning title to the disputed property.

A title opinion is, by its nature, a legal opinion. The authority to issue legal opinions for the Department of the Interior is delegated to the Department's Solicitor, not to BIA. 209 DM 3.1A.

7/ Under Reorganization Plan No. 3 of 1950, 64 Stat. 1262, the authorities of Bureaus within the Department of the Interior were transferred to the Secretary of the Interior, with authority to delegate.

The Solicitor has issued a number of legal opinions in disputes involving title to lands claimed by Indian tribes. The Pueblo cites one opinion, Solicitor's Opinion M-37000 (December 5, 2000). Although that opinion does not reach the merits of the particular dispute it concerns, it cites several earlier Solicitor's Opinions which deal with the merits of other disputes. These include: Solicitor's Opinion M-36887 (June 3, 1974), 84 I.D. 72, II Op.Sol. Indian Affairs 2062, concerning the boundaries of the Colville and Spokane Indian Reservations and title to certain lands within those reservations; Solicitor's Opinion M-36867 (Dec. 21, 1972), II Op.Sol. Indian Affairs 2050, concerning title to accretion lands adjacent to the Cocopah Indian Reservation; and Solicitor's Opinion M-36770 (Jan. 17, 1969), II Op.Sol. Indian Affairs 1977, concerning the south boundary of the Salt River Indian Reservation. See also, e.g., Solicitor's Opinion M-37002, January 19, 2001, concerning the eastern boundary of the Sandia Pueblo; Solicitor's Opinion M-36884 (Oct. 28, 1976), 83 I.D. 529, concerning the eastern boundary of a portion of the Pueblo of Taos; and an unnumbered Solicitor's Opinion of August 15, 1974, II Op.Sol. Indian Affairs 2071, concerning title to certain lands with the Chemehuevi Indian Reservation. Some of these Solicitor's Opinions have formed the bases for Secretarial decisions concerning title. 8/

The Regional Director's October 16, 2002, decision was not based upon a Solicitor's Opinion as to title. Although the Acting Southwest Regional Solicitor reviewed a draft of the Regional Director's letter to the Chacons and other materials provided to him by the Regional Director, 9/ he did not provide a true title opinion, but only a general response, in which he stated: "Based on the materials you provided with your Memorandum, we agree that the law of accretions to the upland riparian landowner is applicable within the Santa Clara Grant. Therefore, your draft letter to Mr. Chacon provides a legally correct recitation of applicable law." Acting Southwest Regional Solicitor's Mar. 1, 2002, Response to the Regional Director. This general response was not sufficient to serve as a title opinion for the disputed property.

Therefore, even if the Regional Director has the authority to issue a decision affecting title to land when the decision is based upon a title opinion from the Office of the Solicitor, the October 16, 2002, decision was not based upon such a title opinion. Rather it was, or purported to be, a title opinion issued by the Regional Director.

8/ For example, on Apr. 11, 1977, the Secretary ordered a new survey based upon Solicitor's Opinion M-36884. See Pueblo of Taos v. Andrus, 475 F. Supp. at 363. And on Nov. 1, 1974, the Secretary confirmed the title of the Chemehuevi Tribe to the land discussed in the Solicitor's Opinion of Aug. 15, 1974. See Havasu Lake Betterment Ass'n v. Phoenix Area Director, 22 IBIA 64 (1992).

9/ Significantly, those materials did not include the GLO survey documents, the patent to Zacarias Rodriguez and Rosarita V. de Rodriguez, or any other documents relating to the Pueblo Lands Act proceedings concerning the property now owned by the Chacons.

The Board concludes that the Regional Director's October 16, 2002, decision must be vacated as beyond the Regional Director's authority.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Regional Director's October 16, 2002, decision is vacated, and this matter is returned to him for further action as appropriate. 10/

// original signed
Anita Vogt
Senior Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

10/ There is unlikely to be a simple solution to this title dispute. The Regional Director may want to seek a true title opinion from the Solicitor. If so, he should furnish the Solicitor with the materials provided by the Pueblo during this appeal. At some point, a determination as to accretion/avulsion would need to be made. And in the end, a Solicitor's Opinion would not resolve the dispute unless the parties were willing to abide by it.

Another possible course of action would be for the Regional Director to request a resurvey from BLM, which could then be challenged in Departmental proceedings. An example of such a procedure may be seen in Lorna L. Boykin, 130 IBLA 301 (1994), a decision of the Interior Board of Land Appeals. Following a complicated survey history, BIA asked BLM to conduct a resurvey of two Indian allotments, one of which had passed out of trust. Two private landowners protested the resurvey, which found that land the landowners believed to be theirs was actually part of the allotment which remained in trust status. In a decision final for the Department of the Interior, the Board of Land Appeals affirmed a BLM decision rejecting the protest.